NG HAN SENG & ORS

v.

SCOTCH LEASING SDN BHD

COURT OF APPEAL, KUALA LUMPUR
NIK HASHIM JCA
AUGUSTINE PAUL JCA
ZAINUN ALI J
[CIVIL APPEAL NO: W-02-128-02]
1 OCTOBER 2003

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Judgment in default of appearance - Time-limit - Non-compliance - Whether application to set aside should be dismissed in limine - Whether merits of application should be considered - Rules of the High Court 1980, O. 42 r. 13*

This was a straightforward appeal by the defendants against the decision of the learned judge reversing the order of the senior assistant registrar allowing their application to set aside the judgment in default of appearance entered in favour of the plaintiff.

Held (dismissing the appeal):
Per Nik Hashim JCA

[1] The defendants' application to set aside the judgment in default of appearance entered against them was filed outside the time limit prescribed by O. 42 r. 13 of the Rules of the High Court 1980. There was also no explanation for the delay, nor was there any application for an extension of time to file the said application. Hence, the merits of the defendants' application could not be considered and the application itself should be dismissed in limine. (p 536 b-d)

Per curiam:

[1] The validity of the service of the plaintiff's writ of summons by way of substituted service could not be challenged colaterally; it could only be challenged in proceedings instituted for that very purpose. (pp 536 e-h & 537 a-b)

[2] The plaintiff's action was not time-barred. The defendants' liability was founded on an 'on demand' guarantee and indemnity, and the plaintiff had made a proper demand in accordance with the terms thereof. (pp 537 c-h & 538 a)

[Appeal dismissed; decision of learned judge affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah satu rayuan biasa oleh defendan terhadap keputusan yang arif hakim kerana menterbalikkan keputusan penolong kanan pendaftar yang membenarkan permohonan mereka mengetepikan penghakiman ingkar kehadiran yang telah diperolehi plaintif.

Diputuskan (menolak rayuan)
Oleh Nik Hashim HMR

[1] Permohonan defendan untuk mengetepikan penghakiman ingkar kehadiran yang telah dimasukkan terhadap mereka difail di luar had masa yang ditetapkan A. 42 k. 13 Kaedah-Kaedah Mahkamah Tinggi 1980. Tidak juga terdapat apa-apa penjelasan tentang kelengahan ataupun apa-apa permohonan untuk melanjutkan masa untuk memfail permohonan tersebut. Oleh sebab itu, merit permohonan defendan tidak dapat dipertimbangkan dan ianya harus di tolak in limine.

Per curiam:

[1] Kesahan penyampaian writ saman plaintif melalui penyampaian ganti tidak boleh dicabar secara kolateral; ia hanya boleh dicabar melalui prosiding yang dikemukakan khas untuk tujuan itu.

[2] Tindakan plaintif tidak dihalang oleh had masa. Tanggungan defendan adalah didasarkan kepada suatu gerenti dan indemniti 'on demand', dan plaintif telah pun membuat tuntutan yang teratur menurut terma-termanya.

Rayuan ditolak; keputusan yang arif hakim disahkan.]

Case(s) referred to:

Abdul Latif Mohamed Ibrahim v. International Factors Leasing Pte Ltd [2001] 2 CLJ 140 CA ***(refd)***

Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor And Another Appeal [1996] 1 CLJ 141 FC ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 CLJ 335 CA ***(refd)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank Bhd [1989] 3 MLJ 155 SC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 42 r. 13

For the appellants - Lim Chong Leong; M/s Azam Lim & Pang
For the respondent - TY Teh; M/s TY Teh & Partners

Reported by Gan Peng Chiang

JUDGMENT

Nik Hashim JCA:
In this appeal, the three appellants (the defendants in the court below) appealed against the decision of the learned judge when he reversed the learned senior assistant registrar's decision and hence dismissing the appellants' application to set aside the respondent's (the plaintiff's) judgment in default (JID) of appearance entered against the appellants on 21 July 1999.

The appeal was heard and dismissed on 11 September 2003. We now give our reasons.

Factual Background
By way of a lease agreement dated 17 January 1983 (the lease agreement) the respondent as owner of the equipment therein stated leased the same to a company called Joo Fah Huat Sdn Bhd (the lessee). The appellants, directors of the lessee, entered into a guarantee and indemnity also dated 17 January 1983 (the guarantee and indemnity) in favour of the respondent as guarantors to the lessee.

On 1 August 1997, the respondent's solicitors sent their demands to the appellants as the said guarantors. A writ of summons was filed against the appellants on 29 December 1997. On 18 November 1998 an order for substituted service of the writ of summons against the appellants was granted by the court (the ss order). On 22 January 1999, upon compliance of the ss order, the respondent filed the affidavit of service and certificate of non-appearance. On 21 July 1999, a judgment in default (JID) of appearance was entered against all the three appellants. Then, by the respondent solicitors' letters dated 3 August 1999, the JID was sent to and received by the three appellants. Some two months and seven months thereafter, on 7 October 1999 in encl. 15 and on 27 March 2000 in encl. 21, the 1st and 3rd appellants followed by the 2nd appellant, filed their respective applications to set aside the JID.

The Appeal

Learned counsel for the appellants admitted at the outset that the appellants' applications to set aside the JID in encls. 15 and 21 were filed outside the time allowed. However, he contended that the appellants' case had merits which would justify setting aside the JID.

From the record, the JID was not irregular in any way. However, the appellants' applications did not comply with O. 42 r. 13 of the Rules of the High Court 1980 which requires that a party intending to set aside a judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the judgment by him. In the present case, the 1st and 3rd appellants were two months outside the time allowed whereas the 2nd appellant was seven months. Further, there was no explanation whatsoever from the appellants for their delay in approaching the court and that they had not prayed for extension of time to make their applications. In these circumstances, there was clearly no need for the merits of the appellants' applications to be considered and in fact they should be dismissed in limine. (see *Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 CLJ 335; *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; *Abdul Latif bin Mohamed Ibrahim v. International Factors Leasing Pte Ltd* [2001] 2 CLJ 140).

Nevertheless, like the learned judge in the court below, we felt disposed to consider the issues raised by the appellants in support of their applications: (i) non-service of writ (ii) time bar (iii) matter is fully settled, and (iv) failure of consideration.

(i) Non-Service Of Writ

We agreed with the learned judge that the service of the writ of summons on the appellants was pursuant to the ss order dated 18 November 1998, resort to which was due to the appellants' changes of addresses without informing the plaintiff. The 'new' addresses of the appellants where the judgment were received by them were obtained from IC searches carried out after the JID. The addresses of the appellants where a copy each of the writ of summons was sent were addresses last known and as per the guarantee. It was incumbent on the appellants to inform the respondent of any change of the addresses and this, they failed to do. The respondent had complied with the ss order and the appellants could not now challenge the ss order in their applications for that would amount to a collateral attack on the validity of the process thereto which is not permitted. The validity

of the ss order can only be challenged by proceedings instituted for the very purpose. It cannot be challenged collaterally in other proceedings. Peh Swee Chin FCJ, delivering the judgment of the then Supreme Court in *Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor and Another Appeal* [1996] 1 CLJ 141 at p. 146 said:

> The order of substituted service of the High Court ... must be obeyed by everyone save in a few and rare exceptions and it can only be challenged as regards its validity by the only way of having it set aside by proceedings instituted for the very purpose. It cannot be challenged thus collaterally in any proceedings as regards its validity save in a very few rare exceptions ...

(ii) Time Bar

The appellants' contention on this action being time barred was misconceived as the demands made by the respondent's solicitors were made pursuant to a on 'demand' guarantee and indemnity: see para. 1 of the Guarantee & Indemnity at p. 0207 of the appeal record. Here the letter of guarantee is very clear. A proper demand was made in accordance with the terms of the Guarantee & Indemnity (see *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad* [1989] 3 MLJ 755), and therefore, it followed that the appellants' liability to the respondent was founded on the 'on demand' clause under the Guarantee & Indemnity, which demands were duly made on them by the respondent's solicitors' letters to them dated 1 August 1997, well within six years prior to the issuance of the writ of summons dated 29 December 1997. Thus, the issue of time bar did not arise.

(iii) Matter Is Fully Settled

We also agreed with the learned judge that the settlement that took place in 1995 was between the respondent and the 1st appellant only over a charge on his land that he created in favour of the respondent in consideration of the loan of RM100,000 given to him. Due to the 1st appellant's breach under the charge, the respondent commenced foreclosure proceedings against him which prompted the 1st appellant to subsequently institute an action under Civil Suit No: 22-15-1994 at the Temerloh High Court against the respondent alleging non-payment of the sum of RM100,000 under the charge. A settlement was reached between the respondent and the 1st appellant, represented by the solicitors of Messrs. Rosni, Francis Tan & Ho, the terms of which were stated in the documents collectively exhibited as "RA1" to encl. 16. From the record, the 2nd and 3rd appellants were really strangers to the charge and the settlement. To include the strangers to the settlement

would be in violation of the elementary principle of contract. Since the settlement was strictly between the respondent and the 1st appellant, the 2nd and 3rd appellants' allegation that the settlement did cover them was therefore without basis.

(iv) Failure Of Consideration

The appellants' contention under this head had no merit. It is clear from exh. "RAA" to encl. 22 at p. 0228 and 0229 of the appeal record that the lessee company acknowledged receipt of the leased goods. Thus, clearly there was no failure of consideration in this particular case.

Conclusion

The learned judge had considered all the issues raised by the appellants and he was right in his findings. With respect, we agreed with the learned counsel for the respondent that there was no defence on the merits and thereby we dismissed the appeal with costs. The order of the learned judge was affirmed. The deposit was ordered to be paid out to the respondent to account of its taxed costs.

My learned brother Augustine Paul JCA and my learned sister Zainun Ali J have seen this judgment in draft and have expressed their concurrence with the reasons herein.